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No. 84-855

SUPREME COURT OF THE UNITED STATES

October Term 1984

MR
MS. SHIRLEY BASHAM,
ALICE BASHAM,
SHANNON BASHAM, and
LESTER SCOTT - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petitioners' November 28, 1984 Petition for Writ of Certiorari to the Supreme Court of Kentucky

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COMMONWEALTH'S BRIEF IN OPPOSITION (OR RESPONSE) TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Respectfully submitted:

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QUESTION PRESENTED FOR REVIEW

Whether or Not This Court Should Grant Certiorari of a Kentucky Supreme Court Opinion Which Upheld the Right of a State Officer to Utilize Information Obtained by Federal Officers Pursuant to a Lawful Federal Wiretap to Establish Probable Cause for a State Search Warrant When Such State Officer Could Never Have Obtained a Wiretap and, Thus, Never the Information, Since Wiretapping Is Statutorily Unlawful in Kentucky?

LIST OF ALL PARTIES

See caption of the case on the cover; cover prepared in compliance with United States Supreme Court Rule 33.2.

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CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Pursuant to United States Supreme Court Rule 34.2 the respondent respectfully exercises its right of acquiescence to the citations to the opinions and judgments delivered in the courts below as petitioners have set them out—referencing petitioners' Appendix A, B1, B2 and B3—on pages 1-2 of petitioners' petition.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOICED.

Since of the three jurisdictional grounds of 28 U.S.C. §1257 subpart (3) thereof seems the most appro-

priate, pursuant to United States Supreme Court Rule 34.2, the respondent respectfully exercises its right of acquiescence to the concise statement of the grounds on which the jurisdiction of this court is invoked as petitioners have set it out on page 2 of petitioners' petition.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS WHICH THE CASE INVOLVES.

Pursuant to United States Supreme Court Rule 34.2, the respondent respectfully exercises its right of acquiescence to the constitutional provisions, treaties, statutes, etc., as petitioners have set them out—referencing petitioners' Appendix D—on page 2 of petitioners' petition.

CONCISE STATEMENT OF THE CASE [FOR RESPONDENT]

Although petitioners may not have intended to impart this idea, petitioners in the opening line of their STATEMENT OF THE CASE on page 3 of their brief state: "[T]he Federal Bureau of Investigation and the Kentucky State Police began working in concert on an investigation centering on alleged illegal activities in Warren County, Kentucky." "In concert" might impart the idea of a joint effort, a cooperative effort, collusion, if you will. Such was not the case at least in view of how the undersigned attorney read the original twenty-one (21) volumes of evidence and at least in how the Kentucky Supreme Court summarized the evidence.

The undersigned attorney for respondent, who practiced the direct appeal in this case, (the affirming opinion of which is the subject of petitioners' petition for certiorari, *Shirley Basham* v. *Commonwealth and Alice Basham and Shannon Basham* v. *Commonwealth and Lester Scott* v. *Commonwealth,* File Nos. 82-SC-689-MR, 82-SC-391-TG, 82-SC-674-TRG) found, from the volumes of evidence, that the two police agencies instituted their criminal investigations of Mr. Shirley Basham independently of one another and without knowledge of the other's efforts. The Commonwealth's Counterstatement of the Case in the direct state appeal by Mr. Shirley Basham was forty-one (41) pages long, *Shirley Basham* v. *Commonwealth,* File No. 82-SC-609-MR, and in those forty-one (41) pages the Commonwealth, by undersigned counsel, sought to convince the Supreme Court of Kentucky of the independence of the investigations since it was felt that independence, at least initially, was crucial, i.e., no intentional collusion, to circumvent Kentucky law forbidding wiretapping. In this endeavor the Commonwealth was successful as shown by the April 19, 1984 opinion of the Supreme Court of Kentucky—which opinion is the object of this petition for certiorari—and respondent would most respectfully quote from pages 13A-13B of that opinion as it is correctly set out in the petitioners' appendix. (Note that in the published opinion, *Shirley Basham* v. *Commonwealth; Alice and Shannon Basham* v. *Commonwealth; Lester Scott* v. *Commonwealth,* Ky., 675 S. W. 2d 376 (1984) Reh. Den. 1984 the quoted pages appear on one page only, page 382):

The evidence in this case was that initially the federal authorities and state authorities each were conducting an investigation of the suspected criminal activity of Shirley Basham, separate from and independent of each other. The federal authorities were investigating Mr. Basham for interstate transportation of stolen property and of controlled substances; the state authorities for knowingly receiving stolen property and trafficking in narcotics. The federal investigation was older in time and when the federal officers learned of the state investigation it was the federal authorities who first suggested that federal officers and state officers work on this case together.

The federal authorities had made two unsuccessful attempts to obtain an order from federal court to tap the unlisted phones at the Shirley Basham residence before joining their efforts with Kentucky State Police. Thereafter, apparently by their combined efforts, the federal authorities were able to sufficiently document their application to satisfy the federal district judge of the need for and legitimacy of a federal wiretap order. Their procedural difficulties suggest that the federal judge scrupulously took account of the Fourth Amendment considerations underlying the statutory procedure in the federal wiretap statute.

The federal law enforcement officials maintained the wiretap exclusively. State officers were not permitted to listen on any of the earphones, but they were kept advised of what was being heard. This information was then utilized by the state police to secure search warrants which resulted in recovery of stolen property and drugs. Both the physical evidence thus obtained and the

tape recordings were used in evidence against these appellants in the present prosecution.

The only other point respondent would make in this counterstatement and this is in view of petitioners' claim of frustration in their inquiries as to the legality of the federal wiretap, is that when the motions were being argued first in the Warren County Kentucky Circuit Court [Bowling Green, Kentucky, southwestern central Kentucky urban community] and then [approximately eighty-six (86) miles northeast] in the Boyle County Kentucky Circuit Court (Danville, Kentucky), there was at least one comment indicating that the federal wiretap had been continued by order of the United States District Court at least beyond its original thirty (30) day limitation. The only reason respondent's counsel can so state, since it is not part of the record as such, is because Hon. Morris Lowe, the Commonwealth's Attorney for the 8th Judicial District of Kentucky [basically Warren County, Bowling Green, Kentucky] of many years experience, commented at TR p. 1 that it was his understanding that a thirty day extension had been granted by the federal court but all the state prosecution would use were materials from the first 30 days [of the wiretap]. Otherwise, as already stated, there is nothing in the record on such an extension from the original thirty (30) days [of the wiretap].

SUMMARY OF ARGUMENT

This Court should deny certiorari to the Kentucky Supreme Court on its April 19, 1984 opinion in

Basham since the Kentucky Supreme Court, upon review of cited authorities by appellant and appellee in that Court, simply adopted the approach of the Pennsylvania Superior Court in *Commonwealth* v. *Bennett,* Pa. Super., 319 A. 2d 493 (1976), i.e., a nonrestrictive interpretation of the applicable statute(s). In *Bennett,* New Jersey law enforcement officers, pursuant to a lawful New Jersey wiretap, obtained information which was used by a Pennsylvania officer to obtain a search warrant against Mr. Bennett in Pennsylvania. Though the wiretap would have been illegal under Pennsylvania law, the Superior Court of Pennsylvania ruled that the information obtained from it could be used by the Pennsylvania officer to obtain the Pennsylvania search warrant since to rule otherwise would amount to an unwarranted extension of the exclusionary rule and, otherwise, the applicable Pennsylvania statute(s) did not categorically declare illegal *all* wiretap information no matter *wherever* and *however* obtained and: "Had the legislature so intended, it would have been a matter of no difficulty, by the use of a few simple words of English, to so declare it." *Bennett* at p. 494. In essence, this is all the Kentucky Supreme Court has said in examining Kentucky's anti-wiretapping statute(s) *vis-a-vis* the lawful federal wiretap and the use of information from it by a Kentucky State Trooper to obtain a Kentucky search warrant.

ARGUMENT

This Court Should Not Grant Certiorari of a Kentucky Supreme Court Opinion Which, Based Upon a Non-restrictive Interpretation of the Kentucky Statute(s) by the Kentucky Supreme Court, Upheld the Right of a Kentucky State Trooper to Obtain a State Search Warrant by Use of Information Supplied by Federal Authorities Which Information Was Obtained by the Federal Authorities Pursuant to a Lawful Federal Wiretap Even Though the Kentucky State Trooper Could Never Have Obtained the Wiretap Under the Kentucky Statutes and, Thus, Never the Information on Which the State Search Warrant Was Based.

The anti-wiretapping or anti-eavesdropping statutes are included by respondent in its appendix. The Kentucky Supreme Court, in reviewing those statutes, has simply followed the approach of the Pennsylvania Superior Court in *Commonwealth* v. *Bennett,* Pa. Super., 369 A. 2d 493 (1976) Pet. for Allowance of Appeal Den. 1977. In *Bennett* the situation presented to the Court there was very similar to that presented the Kentucky Supreme Court in *Basham* with the exception that in *Bennett* the Pennsylvania officer supplied the information to the New Jersey officers which resulted in the initiation by the New Jersey officers of the New Jersey investigation. As already stated by respondent in its **CONCISE STATEMENT OF THE CASE** and as accepted by the Kentucky Supreme Court there was no such initial cooperation by the Kentucky authorities and the federal authorities. Initially each was concluding their own investigation. In *Bennett* the Court stated at page 494.

The information in question was derived through a wiretap legally authorized by the Superior Court of New Jersey pursuant to the provisions of the New Jersey Wiretapping and Electronic Surveillance Control Act.[3] While it is conceded that this information could not have been legally obtained under the laws of this Commonwealth had the wiretap occurred within our boundaries, this fact has no effect on information obtained in a sister state.

It is, of course, obvious that the courts of this Commonwealth have absolutely no power to control the activities of a sister state or to punish conduct occurring within that sister state. The legislature of New Jersey has determined that wiretapping, in appropriate circumstances and for proper cause shown, will be permitted within its borders. Thus, the information involved in the appeal before us was obtained by the New Jersey Police under a legal authorization. A conclusion that denies the exchange of information between law enforcement agencies of our Commonwealth and those of our sister states cannot be justified. The overriding public policy must be to allow such an exchange, for public policy, in the absence of legislative mandate, must favor the interest of the public by fostering its protection through the detection and apprehension of those who persist in defying our laws. This is particularly true in the case of major interstate drug dealers whose activities wreck the lives of so many people in this country today. We certainly must extend to all people the protection of constitutional safeguards, but to extend such protection, on the instant facts, would

> be an unwarranted extension allowing procedure to emerge victorious over justice.
>
> It cannot be denied that the Pennsylvania anti-wiretapping statutes proscribe certain activities and declare illegal the evidence obtained from those specified activities within the borders of this Commonwealth. However, nowhere in these legislative enactments are we able to find, either specifically or by inference, a legislative mandate that extends to the activities before us. The legislature, by the enactment of these statutory proscriptions, has clearly spoken its intention. It is the duty of the courts of this Commonwealth to interpret and enforce that intention. It is not, however, a part of the judicial function to extend and amend the legislation here involved by drafting an amendment to that legislation which declares *all* wiretap information and evidence secured thereunder illegal *wherever* and *however* it may be obtained. Had the legislature so intended, it would have been a matter of no difficulty, by the use of a few simple words of English, to so declare it.
>
> 3. N.J.S.A. 2A:156A-1, *et seq.*

Emphasis, Pennsylvania Superior Courts. Thus, since Kentucky has taken the approach of the Pennsylvania Superior Court in *Bennett* and adopted what respondent's counsel has been calling a non-restrictive approach, i.e., since the Kentucky Legislature has not succinctly said otherwise, wiretap information lawfully obtained by one sovereign can be used by Kentucky authorities at least where there is no initial collusion before the two sovereigns, the respondent respectfully suggests that certiorari is inappropriate at this time.

Respondent's counsel also suggests that certiorari would be more appropriate if in view of *Basham* the Kentucky Legislature—which convenes in January 1986—amended KRS Chapter 526 so that not even the type of information that was exchanged here could be used in Kentucky. Such an amendment to Kentucky's anti-eavesdropping, anti-wiretapping statute(s), under the same factual situation as existed in *Basham,* would undoubtedly produce an opposite ruling by the Courts than was so ruled in *Basham* by the Circuit Courts and by the Kentucky Supreme Court. Such ruling would, at least as the undersigned counsel understands, bring the preemption doctrine into play (see Kentucky Supreme Court Justice Leibson's discussion of preemption at *Basham* v. *Commonwealth,* Ky., 675 S. W. 2d 376 at 379 (1984) or page 7A of the petitioners' appendix) and certiorari would be more appropriate as Kentucky law could then have been ruled, in essence, to be at loggerheads with the 1968 Omnibus Crime Control and Safe Streets Act which authorized federal wiretapping under lawfully proscribed conditions. In this regard, respondent's counsel would note that from counsel's review of the Pennsylvania statute books and a careful reading of *Bennett* it appears that the Pennsylvania Legislature, after *Bennett* was rendered, and apparently (speculative though it is for the undersigned) from the urging of VAN der VOORT, Judge, concurring in *Bennett,* see page 497 of the opinion, amended Pennsylvania's anti-wiretap statute(s) (apparently originally very much like Kentucky's) to

allow for wiretapping under very controlled and prescribed conditions.

CONCLUSION

Based upon the foregoing, i.e., respondent's counsel's contention that this petition involves the challenge of an interpretation of a Kentucky law by the highest court of Kentucky—which interpretation in no way invalidated the lawful acts of the federal authorities but instead accommodated them by a non-restrictive statutory construction of the applicable Kentucky statute(s),—this Court should deny the petition for writ of certiorari.

This 15th day of February, 1984.

Respectfully submitted,

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APPENDIX

CHAPTER 526

EAVESDROPPING AND RELATED OFFENSES

526.010 Definition

The following definition applies in this chapter, unless the context otherwise requires:

"Eavesdrop" means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one party thereto by means of any electronic, mechanical or other device.

526.020 Eavesdropping

(1) A person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time.

(2) Eavesdropping is a Class D felony.

526.030 Installing eavesdropping device

(1) A person is guilty of installing an eavesdropping device when he intentionally installs or places such a device in any place with the knowledge that it is to be used for eavesdropping.

(2) Installing an eavesdropping device is a Class D felony.

526.040 Possession of eavesdropping device

(1) A person is guilty of possession of an eavesdropping device when he possesses any electronic, mechanical or other device designed or commonly used for eavesdropping with intent to use that device to eavesdrop or knowing that another intends to use that device to eavesdrop.

(2) Possession of an eavesdropping device is a Class A misdemeanor.

526.050 Tampering with private communications

(1) A person is guilty of tampering with private communications when knowing that he does not have the consent of the sender or receiver, he unlawfully:

(a) Opens or reads a sealed letter or other sealed private communication; or

(b) Obtains in any manner from an employe, officer or representative of a communications common carrier information with respect to the contents or nature of a communication.

(2) The provisions of this section do not apply to the censoring of sealed letters or sealed communications for security purposes in official detention or penal facilities.

(3) Tampering with private communications is a Class A misdemeanor.

526.060 Divulging illegally obtained information

(1) A person is guilty of divulging illegally obtained information when he knowingly uses or divulges information obtained through eavesdropping or tampering with private communications or learned in the course of employment with a communications common carrier engaged in transmitting the message.

(2) Divulging illegally obtained information is a Class A misdemeanor.

526.070 Eavesdropping; exceptions

A person is not guilty under this chapter when he:

(1) Inadvertently overhears the communication through a regularly installed telephone party line or on a telephone extension but does not divulge it; or

(2) Is an employe of a communications common carrier who, while acting in the course of his employment, intercepts, discloses or uses a communication transmitted

through the facilities of his employer for a purpose which is a necessary incident to the rendition of the service or to the protection of the rights or the property of the carrier of such communication, provided however that communications common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

526.080 Forfeiture

Any electronic, mechanical or other device designed or commonly used for eavesdropping which is possessed or used in violation of this chapter, is forfeited to the state and shall be disposed of in accordance with KRS 500.090.